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UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF NEW YORK

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In re: :
OMONUWA G. OMOGUN, : **Chapter 7 Case No. 8-16-75566-las**
:
Debtor. :
----- :
ONYENAEMEKA ETHELBERTH, : **Adversary Proceeding No. _____**
:
Plaintiff, :
:
vs. :
:
OMONUWA G. OMOGUN, :
:
Defendant. :
----- X

COMPLAINT FOR NON-DISCHARGEABILITY OF DEBT AND

OBJECTING TO DISCHARGE PURSUANT TO THE BANKRUPTCY CODE

Plaintiff Onyenaemeka Ethelberth (“Plaintiff” or “Mr. Ethelberth”), by his attorneys,
Goldberg & Fliegel LLP, complaining of the Defendant Debtor Omonuwa G. Omogun
 (“Defendant” or “Debtor” or “Mr. Omogun”), objecting to the discharge of Mr. Omogun’s debts,
and seeking a judgment declaring Debtor’s debt to Plaintiff non-dischargeable and denying
Debtor a discharge, respectfully alleges:

NATURE OF THIS PROCEEDING

1. This is an adversary proceeding brought by Plaintiff Onyenaemeka Ethelberth seeking an exception to and a denial of Mr. Omogun's discharge in Chapter 7, under Sections 523 and 727 of Title 11 of the United States Code (the "Bankruptcy Code"). This Court is referred to herein as the "Bankruptcy Court."

2. In 2012, Plaintiff filed a federal wage and hour lawsuit against his former employer, including its owner Mr. Omogun, captioned *Onyenaemeka Ethelberth v. Choice Security Company et al.*, 12 Civ. 4856 (E.D.N.Y.) (PKC) (VMS) (the "Employment Action" or "EA"). Mr. Omogun was liable as a statutory employer and properly named a defendant in the Employment Action. The Court in the Employment Action is referred to as the "District Court."

3. Following several years of proceedings, on August 25, 2016, the District Court entered a Judgment in Plaintiff's favor against Debtor (and others), ECF #126 in 12 Civ. 4856 (the "Employment Action Judgment"), holding that Debtor's unlawful conduct was willful.

4. No appeals were taken in the Employment Action and, to date, Plaintiff has not collected or received any monies on the Employment Action Judgment.

5. Shortly after the Employment Action Judgment, and on or about November 30, 2016, Mr. Omogun filed a voluntary petition under Chapter 7 of the Bankruptcy Code with the Clerk of this Court (the "Bankruptcy Action"). Debtor's petition is ECF #1 in Chapter 7 Case No. 8-16-75566-las and is referred to herein as the "Petition."

6. Mr. Omogun did so as a strategic maneuver, because he has a history of defaulting on his legal obligations and debts, including without limitation (a) failing to pay Plaintiff's wages

as detailed in the Employment Action Judgment, and (b) apparently failing to pay more than \$5,000,000 in taxes, thereby ranking among the top delinquent taxpayers in New York.

7. Upon information and belief, and based on Debtor's own Petition, testimony at a Rule 341 meeting, and various documentation obtained by Plaintiff, Debtor knowingly and fraudulently made false statements in his Petition and Rule 341 meeting.

8. Accordingly, in this adversary proceeding, Plaintiff seeks a judgment providing, among other items, as follows:

- * Declaring Debtor's debt to Mr. Ethelberth non-dischargeable pursuant to Section 523(a) of the Bankruptcy Code;
- * Holding that the judgment liability of the Debtor to Mr. Ethelberth, as set forth in the Employment Action Judgment, is non-dischargeable pursuant to Section 523(a) of the Bankruptcy Code;
- * Denying Debtor a discharge under Sections 727(a)(2), (a)(3) and (a)(4) of the Bankruptcy Code;
- * Lifting the stay of enforcement of the Employment Action Judgment by Mr. Ethelberth against the Debtor;
- * Awarding Mr. Ethelberth attorneys' fees and costs; and
- * Awarding such other and further relief as the Bankruptcy Court deems just and proper.

9. At this juncture, Debtor's judgment liability to Plaintiff includes: (a) the amount of \$220,605.01 pursuant to the Employment Action Judgment (\$193,161.73 plus \$27,443.28 automatic increase); and (b) additional interest to be determined.

PARTIES, JURISDICTION AND VENUE

10. Plaintiff is an individual currently residing in the State of Oklahoma.

11. Upon information and belief, and according to the Petition, Defendant currently resides at 2 Wallace Court, Valley Stream, New York 11580. (ECF #1).

12. This Court has jurisdiction pursuant to 28 U.S.C. §§ 157 and 1334 in that it arises under Title 11, United States Code, in a case presently pending before this Court.

13. This is a core proceeding pursuant to 28 U.S.C. §157(b)(2)(I).

14. Venue in this District is proper since this proceeding arises out of, and is brought in conjunction with, a case pending in this District under Title 11 of the United States Code.

THE EMPLOYMENT ACTION AND JUDGMENT AGAINST DEBTOR

15. As noted above, in 2012, Plaintiff filed the Employment Action against Mr. Omogun and other parties (“Employment Action Defendants”). (Exhibit A [EA ECF #17]). A copy of the Civil Docket in the Employment Action is annexed hereto as Exhibit B.

16. In the Employment Action, Plaintiff asserted claims for, among other items, unpaid overtime wages, liquidated damages, prejudgment interest, attorneys’ fees and costs, against Employment Action Defendants under the New York Labor Law (“NYLL”), Fair Labor Standards Act (“FLSA”) and unjust enrichment. (Exhibit A).

17. The Employment Action Defendants were Mr. Omogun and various corporate entities Choice Security Company, Choice Group, Inc., Choice Security Services, Inc., Choice Security Services Inc., Choice Security Services, and Choice Security Co. The District Court referred to the corporate defendants in the Employment Action as “Choice Security Defendants.”

18. The parties in the Employment Action, represented by counsel, conducted discovery and filed cross motions for summary judgment. In February 2015, the District Court granted Plaintiff summary judgment on his core claims. (Exhibit C [EA ECF #97]).

19. On May 14, 2015, the District Court held a conference in the Employment Action. On May 19, 2015, the District Court entered a Minute Order, stating in pertinent part: “The Choice Security Defendants shall have to retain counsel and file a notice of appearance by June 15, 2015, or otherwise be found in default.” (Exhibit B, EA Docket at 5/14/15).

20. The Choice Security Defendants failed to comply with that Minute Order. On June 17, 2015, a Clerk’s Certificate of default was issued. (Exhibit B, EA Docket at 6/17/15).

21. In January 2016, the District Court in the Employment Action entered a default as against Mr. Omogun. (Exhibit D [EA ECF#115]).

22. The District Court found that Defendant George Omogun defaulted and directed Plaintiff to file a renewed application for default judgment. (Exhibit D [EA ECF #115]).

23. On March 30, 2016, Plaintiff filed his renewed application and also moved for an award of damages, liquidated damages, prejudgment interest, attorneys’ fees and costs. (Exhibit B, EA Docket at 3/30/16).

24. In August 2016, the Magistrate Judge issued a Report and Recommendation, recommending that the District Court enter judgment in favor of Plaintiff as against all Employment Action Defendants, jointly and severally, on Plaintiff’s claims under the NYLL, FLSA and in unjust enrichment, in the amount of \$193,058.13, plus \$5.18 per day in additional prejudgment interest from August 5, 2016 to entry of Judgment. (Exhibit E [EA ECF# 124]).

25. A deadline of August 22, 2016 was set for the filing of any objections to the Report and Recommendation. No objections were filed. (Exhibit B, EA Docket at 8/5/16).

26. On August 25, 2016, the District Court entered a Judgment in the Employment Action. (Exhibit F [EA ECF #126]).

27. The District Court reviewed and adopted the Report and Recommendation, and awarded Plaintiff the following damages and relief as against all Employment Action Defendants, jointly and severally:

- (1) Judgment for Plaintiff on his NYLL claim.
- (2) Judgment for Plaintiff on his FLSA claim.
- (3) Judgment for Plaintiff on his unjust enrichment claim.
- (4) Judgment in Plaintiff's favor in the amount of \$193,161.73, as follows:
 - (a) \$11,734.44 in unpaid overtime wages under the NYLL;
 - (b) \$7,439.28 in unpaid overtime wages under the NYLL (and FLSA);
 - (c) \$10,197.88 in prejudgment interest under the NYLL;
 - (d) \$2,933.61 in liquidated damages under the NYLL;
 - (e) \$7,439.28 in liquidated damages under the FLSA;
 - (f) \$1,842.40 in damages for unjust enrichment;
 - (g) \$821.25 in prejudgment interest on the claim for unjust enrichment;
 - (h) \$147,480 as and for Plaintiff's counsel's Goldberg & Fliegel LLP's attorneys' fees under the NYLL (and FLSA);
 - (i) \$3,169.99 in costs under the NYLL (and FLSA); and
 - (j) \$103.60, representing \$5.18 per day in additional prejudgment interest from August 5, 2016, through the date of entry of Judgment.
- (5) \$182,955.20 of this Judgment was awarded under NYLL Section 663.
- (6) In accordance with Section 663(4) of the NYLL, if any portion of the \$182,955.20 awarded in accordance with Section 663 of the NYLL remains unpaid upon the expiration of ninety days following issuance of this Judgment, or ninety days after expiration of the time to appeal and no appeal therefrom is then pending, whichever is later, the total amount of this Judgment shall automatically increase by \$27,443.28 (*i.e.*, fifteen percent).

(Exhibit F).

28. The District Court expressly held that Employment Action Defendants' conduct was *willful* under the FLSA and NYLL and awarded liquidated damages. (Exhibit D at 8 of 8

[EA ECF #115] (“Defendants’ conduct was willful under FLSA”); Exhibit E at 6 and 12 of 30 [EA ECF #124]) (“Therefore, as a matter of law, Plaintiff has proved that Defendants underpayment of wages was willful.”).

29. All appeal deadlines in the Employment Action expired, no appeals were taken by any party, and no payment was made on the Employment Action Judgment.

30. By the passage of time, the amount of the Employment Action Judgment has increased by \$27,443.28, bringing the total amount to \$220,605.01 (\$193,161.73 plus \$27,443.28 automatic increase), plus additional interest in an amount to be determined. (Exhibit F).

31. Mr. Omogun unlawfully failed to pay Plaintiff wages, in violation of the FLSA and NYLL, and Mr. Omogun’s violations of law were willful.

32. Mr. Omogun’s conduct constituted unlawful violation of the FLSA and NYLL and Mr. Omogun willfully and maliciously intended to harm Plaintiff, and Mr. Omogun did cause Plaintiff to suffer harm.

33. Mr. Omogun’s unlawful conduct against Plaintiff was willful and malicious and was “willful” mandating an award of liquidated damages under the FLSA and NYLL.

34. Mr. Omogun intentionally violated the FLSA and NYLL, intended to cause Plaintiff harm and actually caused Plaintiff harm.

35. Mr. Omogun’s actions against Plaintiff also constituted aggravated, socially reprehensible conduct.

36. Mr. Omogun is personally liable to Plaintiff for violations of the FLSA and NYLL and under the common law.

37. In the Employment Action, the District Court awarded Plaintiff judgment against Mr. Omogun as an individual in the amount of \$220,605.01, comprised of various categories of damages and relief, including without limitation liquidated damages. (Exhibit F).

38. To date, Plaintiff has not collected or received any monies awarded by the District Court in the Employment Action and as set forth in the Employment Action Judgment.

39. As of the date of this filing, Plaintiff is entitled to recover from Mr. Omogun \$220,605.01, as well as additional interest in an amount to be determined. (Exhibit F).

40. In the Employment Action, the District Court issued a valid and final judgment and award of damages against Mr. Omogun. (Exhibit F).

DEBTOR'S SWORN STATEMENTS ARE CONTRADICTED BY EVIDENCE

A. Debtor Swore To Various Items In The Petition And At The Rule 341 Meeting

41. As noted above, on November 30, 2016, Mr. Omogun commenced this Bankruptcy Action by filing his Petition. (ECF #1).

42. At all times in this Bankruptcy Action, Mr. Omogun was represented by legal counsel. (ECF #1).

43. Upon information and belief, Debtor filed a sworn Petition and gave sworn testimony in which he knowingly and fraudulently: (a) gave false information about his ownership of real property; (b) concealed his ownership of real property; (c) gave false information about his bank accounts; (d) concealed his ownership of bank accounts; (e) gave false information about his businesses; (f) concealed his ownership and/or operation of businesses; (g) gave false, incomplete or misleading information about his property or financial

affairs; and (h) omitted from his Petition (and schedules) and testimony property and/or assets required to be disclosed and listed under the Bankruptcy Code.

44. In the Petition, Mr. Omogun attested as follows: “I have read the answers on this Statement of Financial Affairs and any attachments, and I declare under penalty of perjury that the answers are true and correct. I understand that making a false statement, concealing property, or obtaining money or property by fraud in connection with a bankruptcy case can result in fines up to \$250,000, or imprisonment for up to 20 years, or both.” (ECF #1 at 40 of 49).

45. On January 25, 2017, Mr. Omogun attended and testified at a Rule 341 meeting (“Rule 341 Meeting”), a transcript of which is annexed hereto as Exhibit G.

46. Mr. Omogun testified that his Petition (*i.e.*, his “bankruptcy papers”) was true and complete and that he did not want to make any changes to it. (Exhibit G at 4:20-5:3).

B. Debtor’s Sworn Statements About Real Property Are Contradicted By Evidence

47. In the Petition, Mr. Omogun swore that he is the owner of 2 Wallace Court, Valley Stream, New York 11580 (“2 Wallace”) (ECF # 1 at 10 of 49).

48. At the Rule 341 Meeting, Mr. Omogun testified that, among other items, that: (a) 2 Wallace is the only real property that he owns; and (b) he does not own any other real property. (Exhibit G at 18:25-19:11).

49. In addition, Mr. Omogun specifically testified that he does not own any property in Pennsylvania or North Carolina. (Exhibit G at 19:12-17).

50. Upon information and belief, and based on documentation obtained by Plaintiff (Exhibit H), Debtor owns at least two properties in Pennsylvania in the counties of Wayne and Monroe (“Pennsylvania Properties”).

51. Debtor omitted the Pennsylvania Properties from his Petition (ECF #1) and testified under oath that he does not own any property there. (Exhibit G at 19:12-14).

52. Upon information and belief, and based on documentation obtained by Plaintiff (Exhibit I), Debtor owns property in North Carolina (“North Carolina Property”).

53. Debtor omitted the North Carolina Property from his Petition (ECF #1) and testified under oath that he does not own any property there. (Exhibit G at 19:15-17).

C. Debtor’s Sworn Statements About Bank Accounts Are Contradicted By Evidence

54. In the Petition, Mr. Omogun swore that he has only two bank accounts: (a) Chase Bank, \$150; and (b) Citi Bank, \$150. (ECF #1 at 12 of 49).

55. At the Rule 341 Meeting, Mr. Omogun suddenly admitted that he had another bank account, at Bank of America, contradicting his Petition. (Exhibit G at 21:3-7; ECF #1).

56. In addition, at the Rule 341 Meeting, Mr. Omogun denied having any account with Capital One Bank. (Exhibit G at 21:12-14).

57. Upon information and belief, and based on documentation obtained by Plaintiff, Debtor has a bank account/funds with Capital One Bank. (Exhibit J).

D. Debtor’s Sworn Statements About His Businesses Are Contradicted By Evidence

58. In the Petition, Mr. Omogun swore that he owned/operated only two businesses within the last four years: (1) Choice Group, Inc. (“Choice Group”); and (2) Catskill Security Training Corp. (“Catskill Security”) (ECF #1 at 38 of 49).

59. In the Petition, Mr. Omogun swore that (1) Choice Group existed only from 2004-December 2015 and (2) Catskill Security existed only from 2010-2015. (ECF #1).

60. In contrast to the Petition, at the Rule 341 Meeting, Mr. Omogun testified that: (1) Choice Group (d/b/a Choice Security) provided security guard services in 2016 (Exhibit G at 24:1-6); and (2) Catskill Security is an active corporation. (Exhibit G at 23:3-6, 18-20).

61. In the Petition, Mr. Omogun did not identify State Security Services as a business owned/operated by him. (ECF #1). However, at the Rule 341 Meeting, Mr. Omogun acknowledged that entity, thereby contradicting the Petition. (Exhibit G at 23:7-17). Mr. Omogun also testified that “it’s not active yet” and “it’s not in existence.” (Exhibit G at 23:10-17).

62. Upon information and belief, and based on documentation obtained by Plaintiff, Debtor currently has at least *four* existing/“active” businesses: (a) Choice Group, Inc. (New York corporation); (b) Catskill Security Training, Corp. (New York corporation); (c) State Security Services Inc (New York corporation); and (d) Choice Security Company (Connecticut corporation). (Exhibit K). The Petition omits any reference to State Security Services Inc and Choice Security Company. (ECF #1).

63. Upon information and belief, and in accordance with the above, Debtor knowingly and fraudulently: (1) omitted his Pennsylvania Properties from his Petition testified that he does not own property in Pennsylvania; (2) omitted his North Carolina Property from his Petition and testified that he does not own property in North Carolina; (3) omitted his Capital One Bank account from his Petition and testified that he does not have a bank account with Capital One Bank; and (4) omitted his businesses State Security Services Inc and Choice Security Company from his Petition to conceal those businesses from the Bankruptcy Court and testified that certain of his businesses do not exist/are not active when in fact those businesses exist/are active.

64. Upon information and belief, Debtor owns and has substantial assets not listed in his Petition, as Debtor would have had to accumulate tens of millions of dollars in revenue, profit and/or income in order to amass an alleged tax liability exceeding \$5,000,000. (ECF #1).

65. At present, the Trustee has scheduled a continued Rule 341 Meeting for April 18, 2017. Plaintiff reserves the right to amend this Complaint following further investigation and discovery of documents/information regarding Debtor based on the ongoing proceedings.

COUNT ONE

BANKRUPTCY CODE 523(a)

66. Plaintiff repeats and realleges all of the foregoing Paragraphs.

67. 11 U.S.C. § 523(a)(6) provides, in relevant part, that:

(b) A discharge under section 727, 1141, 1228(a), 1228(b) or 1328(b) of this title does not discharge an individual debtor from any debt—

...

(6) or willful and malicious injury by the debtor to another entity or to the property of another entity . . .

68. Under Section 523(a)(6) of the Bankruptcy Code, the Court will not discharge an individual debtor from any debt for “willful and malicious injury by the debtor to another entity.” 11 U.S.C. Sec. 523(a)(6).

69. Debtor’s pre-petition conduct which gave rise to the debt in this case was “willful and malicious” under 11 U.S.C. § 523(a)(6) such that it is a nondischargeable debt.

70. All or part of the debt owed to Plaintiff, as evidenced by, among other items, the Employment Action Judgment entered against the Debtor, is non-dischargeable as it is a debt for *willful and malicious* injury caused by the Debtor within the meaning of Bankruptcy Code § 523(a)(6).

71. The findings of the District Court in the Employment Action clearly and unequivocally show that the underlying behavior was willful and malicious.

72. The nature of the damages awarded by the District Court in the Employment Action demonstrates the willful and malicious nature of Mr. Omogun's conduct and that the judgment liability is nondischargeable debt.

73. Debtor had a full and fair opportunity to litigate the claims in the Employment Action and the District Court in the Employment Action, after affording the parties a full and fair opportunity to submit their positions, made findings of fact and law regarding Plaintiff's claims.

74. The findings of the District Court in the Employment Action, and the nature of and amounts of damages awarded in the Employment Action Judgment, preclude Mr. Omogun by the doctrine of collateral estoppel from challenging whether the underlying behavior was committed "willfully and maliciously" so as to satisfy the requirements of 11 U.S.C. § 523(a)(6) .

75. The findings of the District Court in the Employment Action are sufficient to support a finding of willful and malicious injury by Debtor against Ethelberth pursuant to 11 U.S.C. § 523(a)(6).

76. Accordingly, the debt owed to Plaintiff by Debtor, pursuant to the Employment Action Judgment, is non-dischargeable under 11 U.S.C. § 523(a)(6), as it is a debt for willful and malicious injury caused by the Debtor within the meaning of Bankruptcy Code § 523(a)(6).

COUNT TWO

BANKRUPTCY CODE 727(a)(2)

77. Plaintiff repeats and realleges all of the foregoing Paragraphs.

78. 11 U.S.C. § 727(a)(2) provides that “The court shall grant the debtor a discharge, unless . . .

(2) the debtor, with intent to hinder, delay, or defraud a creditor or an officer of the estate charged with custody of property under this title, has transferred, removed, destroyed, mutilated, or concealed, or has permitted to be transferred, removed, destroyed, mutilated, or concealed—
(A) property of the debtor, within one year before the date of the filing of the petition; or
(B) property of the estate, after the date of the filing of the petition.”

79. Upon information and belief, the Debtor, with intent to hinder, delay, or defraud a creditor or an officer of the estate charged with custody of property under this title, transferred, removed, destroyed, mutilated, or concealed, or has permitted to be transferred, removed, destroyed, mutilated, or concealed property of the debtor and/or estate during the relevant period.

80. By virtue of the foregoing, the Debtor’s discharge should be denied under Bankruptcy Code § 727(a)(2).

81. The Court should deny Debtor a discharge under 11 U.S.C. § 727(a)(2).

COUNT THREE

BANKRUPTCY CODE 727(a)(3)

82. Plaintiff repeats and realleges all of the foregoing Paragraphs.

83. 11 U.S.C. § 727(a)(3) provides that “The court shall grant the debtor a discharge, unless . . .

(3) the debtor has concealed, destroyed, mutilated, falsified, or failed to keep or preserve any recorded information, including books, documents, records, and papers, from which the debtor's financial condition or business transactions might be ascertained, unless such act or failure to act was justified under all of the circumstances of the case.”

84. Upon information and belief, the Debtor concealed, destroyed, mutilated, falsified, or failed to keep or preserve any recorded information, including books, documents,

records, and papers, from which the Debtor's financial condition or business transactions might be ascertained.

85. By virtue of the foregoing, the Debtor's discharge should be denied under Bankruptcy Code § 727(a)(3).

86. The Court should deny Debtor a discharge under 11 U.S.C. § 727(a)(3).

COUNT FOUR

BANKRUPTCY CODE 727(a)(4)

87. Plaintiff repeats and realleges all of the foregoing Paragraphs.

88. 11 U.S.C. § 727(a)(4) provides that "The court shall grant the debtor a discharge, unless ---

(4) the debtor knowingly and fraudulently, in or in connection with the case made a false oath or account; presented or used a false claim; gave, offered, received, or attempted to obtain money, property, or advantage, or a promise of money, property, or advantage, for acting or forbearing to act; or withheld from an officer of the estate entitled to possession under this title, any recorded information, including books, documents, records, and papers, relating to the debtor's property or financial affairs."

89. Upon information and belief, Debtor knowingly and fraudulently made false oaths and accounts within the meaning of 11 U.S.C. § 727(a)(4).

90. Specifically: (1) the debtor made a statement under oath; (2) the statement was false; (3) the debtor knew the statement was false; (4) the debtor made the statement with fraudulent intent; and (5) the statement related materially to the bankruptcy case.

91. Upon information and belief, Debtor knowingly and fraudulently withheld from an officer of the estate entitled to possession under this title, any recorded information, including books, documents, records, and papers, relating to the debtor's property or financial affairs, within the meaning of 11 U.S.C. § 727(a)(4).

92. By virtue of the Debtor's conduct, including without limitation false oaths and accounts, false representations and omissions, and the oath he took concerning the veracity of his submissions, the Debtor's discharge should be denied under Bankruptcy Code § 727(a)(4).

93. The Court should deny Debtor a discharge under 11 U.S.C. § 727(a)(4).

WHEREFORE, Plaintiff respectfully requests a Judgment against Defendant, as follows:

- (A) Declaring Debtor's debt to Mr. Ethelberth non-dischargeable pursuant to Section 523(a) of the Bankruptcy Code;
- (B) Holding that the judgment liability of the Debtor to Mr. Ethelberth, as set forth in the Employment Action Judgment, is non-dischargeable pursuant to 11 U.S.C. § 523(a);
- (C) Holding that such judgment liability includes: (a) the amount of \$220,605.01 pursuant to the Employment Action Judgment; and (b) additional interest to be determined;
- (D) Denying Debtor a discharge under Sections 727(a)(2), (a)(3) and (a)(4) of the Bankruptcy Code;
- (E) Lifting the stay of enforcement of the Employment Action Judgment by Mr. Ethelberth against the Debtor;
- (F) Awarding Mr. Ethelberth attorneys' fees and costs; and
- (G) Awarding such other and further relief as the Bankruptcy Court deems just and proper.

Dated: March 9, 2017
New York, New York

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